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**URBAN AIR QUALITY LITIGATION UNDER THE CLEAN AIR ACT:
PAST, PRESENT AND FUTURE**

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Air Quality Protection in the West

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**URBAN AIR QUALITY LITIGATION UNDER THE CLEAN AIR ACT:
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David S. Baron

I. INTRODUCTION

A. A Summary Of The Clean Air Act Provisions Relating To Urban Air Quality.

Almost two decades ago, Congress moved to end chronic air pollution problems in the nation's cities by enacting the Clean Air Act of 1970 (the Act). Pursuant to the Act, the United States Environmental Protection Agency (EPA) in 1971 established national ambient air quality standards (NAAQSs) for carbon monoxide (CO), ozone and particulate matter (PM) the pollutants then of most concern in urban areas - at levels designed to protect the public health and welfare. 36 Fed. Reg. 22384 (1971) (codified as amended at 40 C.F.R. pt. 50). The Act required each state to submit to EPA a state implementation plan (SIP) designed to ensure attainment of these standards generally within three years, (but in no event later than mid-1977), and maintenance of standards thereafter. §7410(a)(1).¹

After many states failed to meet the deadlines, Congress amended the Act in 1977 to provide for new deadlines coupled with additional requirements to ensure attainment. The

¹ Unless otherwise indicated all section references herein are to sections of the Clean Air Act as codified in Title 42 U.S. Code.

amendments directed the states or EPA to identify areas within each state not meeting the NAAQSs: such areas were to be designated "nonattainment" for each pollutant exceeding the standards. §§7407(d), 7501; 43 Fed. Reg. 8962 (1978). In 1978, EPA identified literally dozens of cities as nonattainment areas, and many of these designations continue to this day. 40 C.F.R. Part 81 (1988).

The 1977 amendments required the states to revise their SIPs by January 1, 1979 to provide for attainment of standards in each nonattainment area "as expeditiously as practicable," but in the case of health (primary) standards "not later than December 31, 1982." §7502(a); Pub. L. No. 95-95, §129(c). Such SIP revisions were to meet detailed requirements for ensuring attainment set out in Part D of Title I of the Act (§§7501-7508, hereinafter "Part D"). Part D required, among other things, that SIP revisions inventory all emissions of violating pollutants and promise the implementation of "all reasonably available control measures as expeditiously as practicable." §7502(b). Where motor vehicles were a major source of the problem, these measures had to include transportation control measures (TCMs), that is, measures to reduce emissions from each vehicle and to reduce vehicle traffic. §7410(a)(2)(B); 44 Fed. Reg. 20372, 20375, 20377 (1979); 43 Fed. Reg. 21673, 21676-77 (1978). Section 7408(f)(1)(A) of the Act listed eighteen TCMs that were, pursuant to EPA guidance documents, presumed to be reasonably available. 44 Fed. Reg. 20372, 20377 (1979); 43 Fed. Reg. 21673, 21676-77 (1978). These included programs

for: automobile emissions inspection and maintenance (I/M); improved public transit; exclusive bus and carpool lanes; parking controls; bikeways and pedestrian zones; staggered work hours; and trip reduction programs. §7408(f)(1)(A).

Part D further required that SIP provisions be adopted by the states in such a manner as to be legally enforceable and include commitments of the financial and manpower resources necessary for implementation. §7502(b)(7) & (10). EPA was to review the SIPs when submitted and approve or disapprove them. §§7410, 7502. If EPA approved all or part of the plan then the approved portions of the plan became federally enforceable, both by EPA and by citizen suit. §§7413, 7604(a), (f). If a state failed to submit a plan or revision containing all of the required provisions and commitments, EPA was mandated to promptly promulgate its own plan (or part thereof) within six months to correct the deficiency. §§7410(c)(1), 7502(b)(1). States lacking adequate plans were also subject to termination of federal highway assistance (§7506(a)) and a ban on construction of new major sources of the violating pollutant (§7410(a)(2)(I)).

For CO and ozone nonattainment areas, Part D made limited provision for extension of the 1982 attainment deadline to December 31, 1987. §7502(a)(2). EPA could grant such extensions only if the state demonstrated in its 1979 plan that attainment by the end of 1982 would be impossible despite implementation of all reasonably available measures.

Id. Extension areas had to submit an additional SIP revision by July 1, 1982 providing any further measures necessary to ensure attainment by the "most expeditious date possible" including "[c]omprehensive public transportation measures to meet basic transportation needs." §7502(c); Pub. L. 95-95, §129(c) (reprinted as note to §7502); 46 Fed. Reg. 7185-86 (1981).

B. The Post-1977 Experience.

State and local governments quickly fell behind the schedules set by Congress in the 1977 Amendments. Most states failed to submit their 1979 SIP revisions on time, and many others submitted plans that were inadequate to ensure attainment. See Reed, Marking Time: A Status Report on the Clean Air Act Between Deadlines, 15 Env'tl. L. Rptr. 10022, 10026 (1985) ("Reed"). Despite these widespread failures, EPA avoided imposing federal implementation plans and sanctions by delaying plan disapprovals and offering states additional time to correct deficiencies. Although EPA initially did impose the construction ban on areas that failed to submit timely revisions in 1979, the ban was subsequently lifted in many areas as a result of the Agency's "conditional" approval policy - a policy whereby SIPs with "minor" deficiencies were deemed approved. See Reed at 10026. Two circuits specifically upheld EPA's use of conditional approval, Connecticut Fund for the Environment v. EPA, 672 F.2d 998 (2d Cir. 1982); City of Seabrook v. U.S.E.P.A., 659 F.2d 1349 (5th Cir. 1981), although the Second Circuit

held that a conditional approval could not act to lift the construction ban.

As 1987 approached, EPA still had not finally approved or disapproved the 1979 SIP revisions for many cities. In other urban areas, it was becoming readily apparent that previous plans were either not being implemented or were grossly inadequate to ensure attainment and maintenance of standards. Faced with the prospect of widespread noncompliance with the 1987 deadline, EPA proposed a "post-1987" policy whereby states would be given several more years to again revise their urban SIPs, and three to five years thereafter to attain the standard. 52 Fed. Reg. 40544 (1987). EPA has still not taken final action to adopt this policy, perhaps in the expectation that Congress will shortly rewrite the Clean Air Act to grant the cities more time.

C. The Rising Tide of Citizens Suits.

Citizens suits have always played a pivotal role in implementation and enforcement of the Act. During the 1970's, suits by the Natural Resources Defense Council (NRDC) and other groups were instrumental in forcing EPA disapproval of inadequate SIPs and the imposition of federal implementation plans in a number of cities. See, e.g., NRDC v. EPA, 425 F.2d 968 (D.C. Cir. 1973). In the early years after enactment of the 1977 Amendments, citizens suits were also filed to challenge EPA's conditional approval policy, and to force FIP promulgation. See, e.g., Connecticut Fund for the Environment, supra; Citizens for a Better Environment v.

Costle, 515 F. Supp. 264 (N.D. Ill. 1981). Urban air quality litigation thereafter tapered off somewhat, perhaps due to the ongoing expectation that the Act would again be amended. By the mid-1980's, however, citizens groups were again losing patience, and returned to the courts in increasing numbers. Citizen suits are now forcing the adoption of dramatic new control measures in some of the nation's largest urban areas. An outline of the claims and results in some of the more recent cases is provided below.

II. KEY ISSUES IN URBAN SIP LITIGATION

A. EPA Duty To Set Date Certain For SIP Revision.

As the end of 1987 approached, it became obvious that many cities would not meet the attainment deadline. In addition, a number of nonextension cities (i.e., cities with 1982 attainment deadlines for CO and ozone) had failed to timely attain the standards. Despite these failures, EPA balked at requiring major SIP overhauls - perhaps hoping that Congress would provide some relief. Although the Agency did send out a number of letters asking states to revise their plans, these "SIP calls" often did not include deadlines or specific guidance on additional control strategies needed. This approach left many SIPs in limbo and thwarted citizen enforcement efforts. Because the SIPs on the books were technically "approved," the Act's sanctions for planning failures arguably could not be invoked.

The Act requires states to revise their SIPs whenever EPA finds that a plan is substantially inadequate to attain

the standard. §7410(a)(2)(H). EPA's duty to promulgate a federal implementation plan (FIP) is triggered if the state fails to submit such a revision within 60 days after EPA notification of SIP inadequacy, or within "such longer period" as EPA may prescribe. In 1988 the Natural Resources Defense Council asked a federal district court to hold that EPA had a nondiscretionary duty to notify the State of New York that its CO and ozone SIPs for New York City were inadequate and require their revision by a date certain. NRDC based this request on the fact that New York had obviously not attained the CO and ozone standards by the end of 1987, and that the SIP was therefore by definition inadequate. By the time the issue reached the judge, EPA had finally notified the state of the need to revise the SIP, but had not set a firm due date for the revisions. The court held that while EPA's action mooted NRDC's request for an order requiring notice to the state, the Agency was still under a obligation to set a date certain for a SIP revision by the state. Natural Resources Defense Council v. New York State Department of Environmental Conservation, 700 F. Supp. 173 (S.D. N.Y. 1988).

Although the New York District Court did not reach the issue of EPA's duty to issue a SIP call, even EPA apparently believes that such a duty exists - at least as to cities that are still nonattainment after 1987. As noted above, EPA issued a SIP call to New York before the court even reached the issue, and the Agency has reacted similarly in other

citizen suits. For example, in Conservation Law Foundation v. State of Massachusetts (D. Mass. filed March 1987), the plaintiffs asked that EPA be required to make an ozone SIP call to Massachusetts. In response, EPA did just that, requiring a SIP revision from the state by September 1991.

One issue that these cases do not address is the amount of time that EPA can legally give states to prepare SIP revisions. In light of the fact that the Act allows only nine months after the promulgation of an NAAQS for states to submit SIPs to attain the NAAQS (§7410(a)(1)), citizens groups may argue that nine months is the absolute outside deadline.

Suppose a state submits a revision that EPA deems to be inadequate? Should the state be given another chance? Language in Arizona v. Thomas, 829 F.2d 834 (9th Cir. 1987) suggests not. The court held that because Arizona had "failed in its obligation to produce or make reasonable efforts to produce SIPs which would appear to meet the requirements of the Act," the state "should not be given another opportunity to produce more plans." Id. at 839. Although the case involved a challenge to EPA's disapproval of a SIP that had previously been conditionally approved, the holding may have broader application.

B. EPA Duty To Promulgate Federal Implementation Plans.

The Act's provisions requiring EPA to promulgate federal implementation plans (FIPs) where states have failed to adopt

adequate SIPs are among the most clearcut requirements in the law. For this reason, citizen-plaintiffs are increasingly asking the courts to order FIP promulgation by EPA in nonattainment areas.

1. **Mandatory nature of duty:** Under §7410(c)(1) EPA "shall" promulgate a FIP if the state fails to submit a SIP, if EPA disapproves all or part of submission, or if the state fails to timely revise the SIP in response to a SIP call. The courts have uniformly held that FIP promulgation is mandatory when any of these preconditions have been met, regardless of the technical difficulties or resource limitations involved. For example, citizen/plaintiffs in Arizona obtained a court order requiring EPA to promulgate CO FIPs for Phoenix and Tucson despite EPA claims of administrative and political difficulties. McCarthy v. Thomas, 17 Env'tl. L. Rptr. (Env'tl. L. Inst.) 21214 (D. Ariz. 1987). EPA asserted that federal plan promulgation should be required only as "a last resort," citing resistance that the Agency encountered in promulgating FIPs during the 1970's. The court rejected these arguments, holding that the statute was "clear and unambiguous on its face." Id. at 21216.

Similarly, a U.S. District Court recently ordered promulgation of a federal ozone plan for the Chicago area in Wisconsin v. Thomas, 19 Env'tl. L. Rptr. (Env'tl. L. Inst.) 20964 (E.D. Wis. 1989). At the time of decision, EPA had already disapproved the relevant SIPs, and in fact conceded its duty to promulgate a FIP. The Agency apparently nonethe-

less argued that it should not be ordered to promulgate a FIP, but the court found that history of planning delays in the Chicago areas justified injunctive relief.

EPA's duty to commence promulgation of a FIP is triggered immediately upon disapproval of a state's SIP. The duty is not stayed by a challenge to the legality of the SIP disapproval. Citizens for a Better Environment v. Costle, 610 F. Supp. 106 (N.D. Ill. 1985). One court has ruled that a FIP promulgation duty does not arise solely from EPA delay in making a SIP call, as long as the delay is not "unreasonable." Natural Resources Defense Council v. New York State Department of Environmental Conservation, 700 F. Supp. 173, 181-82 (S.D. N.Y. 1988).

2. **Timeline for FIP promulgation:** Section 7410(c) requires EPA to promulgate a FIP within 6 months of disapproving a SIP submittal, or of a state's failure to meet a SIP submittal deadline. Where a FIP contains any of a variety of measures for which the Act requires consultation with local governments (e.g., transportation controls, air quality maintenance plan requirements) as specified in §7421, an additional 2 months is allowed.² In several recent cases, EPA has asked for 6 months beyond that (for a total of 14

² Until very recently, neither EPA nor the courts appeared to even be aware of the provision allowing the additional 2 months. The Agency "discovered" the provision in the midst of the Arizona SIP litigation. Compare McCarthy v. Thomas, 17 Env'tl. L. Rptr. (Env'tl. L. Inst.) 21214, 21217 (D. Ariz. 1987) with McCarthy v. Thomas, 18 Env'tl. L. Rptr. (Env'tl. L. Inst.) 21025, 21026 (D. Ariz. 1988).

months altogether) under §7607(d)(10) of the Act, which allows EPA to extend the proposal deadline for certain rules where the statutory deadline for promulgation is less than 6 months after the date of proposal. However, the legislative history of the Act indicates that Congress did not intend this additional 6 months to be available where EPA was already being allowed a total of 8 months under §7410(c). H. Rep. No. 294, 95th Cong. 1st Sess. 315, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1394 (1977). EPA sought a 14 month promulgation period in the Arizona SIP litigation, but the district court held that the Act allowed only 8 months. McCarthy v. Thomas, 18 Env'tl. L. Rptr. (Env'tl. L. Inst.) 21025, 21026 (D. Ariz. 1988). The court also rejected EPA claims that more time was needed to do an adequate job, holding that only true impossibility would justify an extension of the statutory deadline. Id. In Wisconsin v. Thomas, 19 Env'tl. L. Rptr. (Env'tl. L. Inst.) 20964 (E.D. Wis. 1989), the court allowed a 14 month promulgation period, but did so because the plaintiffs stipulated thereto: the court did not address whether the Act in fact allowed such a timeframe.

3. Recent settlements: In the past 3 years, clean air advocates in California have filed citizen suits in five separate nonattainment areas seeking court-ordered FIP promulgation and other remedies. Settlements providing for FIP promulgation have recently been reached in three of these cases. In Los Angeles, EPA has agreed to promulgate carbon

monoxide and ozone FIPs by 1991. Coalition for Clean Air v. United States Environmental Protection Agency, No. C88 0540 EFL (C.D. Cal.). In a citizen suit over the plan for Sacramento, EPA has stipulated to FIP proposal by mid-1991, and FIP promulgation by the spring of 1992. Environmental Council of Sacramento v. EPA, CIVS-87-0420 EJG (E.D. Cal.). And in another citizen suit, EPA has recently stipulated to proposal of a FIP for Ventura County (a coastal area just Northwest of Los Angeles) by September 1990, and final FIP promulgation by July 1991. Citizens to Preserve the Ojai v. EPA, No. CV-88 00982 HLH (C.D. Cal.). Under all of these settlements, EPA will be relieved of its FIP promulgation duty if the state submits an approvable plan before the FIP promulgation deadline. In addition, EPA has reserved the right to seek nullification of all or part of each settlement based on any subsequent Clean Air Act amendments that might be passed.

4. Pending cases: There are at least two pending FIP promulgation suits in California that have not yet been resolved. Citizens for a Healthy Environment v. EPA. CVF-89-399 REC (E.D. Cal. filed 1989) (seeking promulgation of a FIP for Kern and Fresno Counties); Citizens for a Better Environment v. Deukmejian, No. C 89 2044 TEH (N.D. Cal. filed 1989) (seeking FIP promulgation, sanctions, and SIP implementation in the San Francisco area).

C. Attainment Deadlines.

By 1987, many cities were so far behind in the adoption

of control measures that attainment by the deadline was either unlikely or impossible. When presented with a SIP revision for Los Angeles that failed to provide for attainment of the CO and ozone standards, EPA sought to avoid the issue by simply approving the control measures in the plan without approving or disapproving the plan overall. In response to a citizen petition, the Ninth Circuit rejected this result, holding that EPA did not have the discretion "to ignore the statutory deadline." Abramowitz v. U.S. EPA, 832 F.2d 1071, 1079 (9th Cir. 1987). Emphasizing the central role of the attainment deadlines under the Act, the court ordered EPA to disapprove the Los Angeles plan (setting the stage for the FIP litigation discussed above).

In the absence of amendments to the Clean Air Act, the next deadline issue will be how quickly states must attain now that the 1987 deadline has passed. In a pending action in the Ninth Circuit, citizens are challenging EPA's approval of Arizona's carbon monoxide SIP which does not provide for attainment until the end of 1991. Delaney v. Thomas, No. 88-7368, (argued June 26, 1989). Petitioners contend that, once the attainment deadline has passed, SIPs must provide for attainment at the earliest possible date using every available control measure. They argue that the Arizona SIP does not meet this standard, because the plan fails to commit to adoption of measures that the state itself identified as likely to advance the attainment date. EPA contends that SIP

revisions submitted after the 1987 deadline need only provide for attainment within three to five years of plan approval and need only employ "reasonably available" control measures. This position, which is also reflected in a 1987 national policy proposal by the Agency (52 Fed. Reg. 45044 1987), is based on an analogy to provisions of the original 1970 Clean Air Act whereby states were given three to five years to attain standards.

D. Maintenance.

The Act requires that SIPs provide not only for attainment of clean air standards, but also for maintenance of clean air thereafter. §§7410(a)(1), 7502(a)(1). EPA has recently taken the position that it will approve SIP revisions as long as they provide for maintenance for at least 10 years after submittal of the revision. See 52 Fed. Reg. 45045, 45080 (1987). The petitioners in Delaney v. Thomas, supra, are arguing that a 10 year maintenance demonstration is not sufficient, based on EPA regulations adopted in the 1970's requiring at least a 20 year maintenance demonstration. 40 C.F.R. §51.42.

E. Failure Of States To Implement SIP Commitments.

In addition to seeking adoption of tougher plans, citizens groups are pressing for enforcement of commitments made by state and local governments in already-approved SIPs and SIP revisions. The Act's citizen suit provision allows citizens to seek judicial enforcement of any "emission standard or limitation" under the Act: a term that is

defined to include a wide variety of SIP provisions and commitments. §§7604(a)(1), (f)(3). Some of the major issues raised in these cases are outlined below.

1. **Enforceability of SIP commitments:** In several of recent cases, citizens groups have been successful in enforcing broadly phrased state commitments to adopt regulatory programs despite state objections that the commitments were too vague to be enforceable. In New Jersey, advocacy groups obtained a fairly sweeping court order requiring the state to adopt emission control regulations for seven major categories of activities including gas stations, barge loading of gasoline, solvent-based consumer products, and various manufacturing operations. Although the SIP provided for these programs, the state argued that the SIP implementation schedules were by their terms only "projected" and were never meant to be binding. The court completely rejected the claim, holding that "a state cannot use its SIP to write around the mandatory requirements imposed by the Act." Because the Act requires that SIP provisions be legally enforceable, the court held that it would not "read ambiguity into the document to make it say less than the law requires." American Lung Association of New Jersey v. Kean, 670 F. Supp. 1285, 1291 (D. N.J. 1987), affirmed, 871 F.2d 319 (3d Cir. 1989).

In Atlantic Terminal Urban Area Renewal Coalition v. New York City Department of Environmental Protection, 697 F. Supp. 157 (S.D. N.Y. 1988), the court found to be enforceable

a SIP commitment by the City of New York to assure that unspecified mitigating measures would be implemented in connection with urban renewal projects to provide for attainment of clean air standards by the deadline. The court rejected claims by the city that the SIP provision was merely an unenforceable goal, finding that it constituted "a commitment on the part of the City to act." Id. at 162. But see Wilder v. Thomas, 659 F. Supp. 1500, 1506 (S.D. N.Y. 1987), affirmed 854 F.2d 605 (2d Cir. 1988) (holding that a SIP commitment simply to attain the standard was not enforceable).

Environmental groups in San Francisco recently obtained a court order requiring implementation of SIP commitments to set emission limits on a wide range of VOC sources and to develop new transportation control measures to assure steady progress toward attainment. Citizens for a Better Environment v. Duekmejian, supra.

2. **Strict liability for compliance:** Citizens groups have generally been successful in enforcing SIP commitments despite state claims that compliance would be economically or technically infeasible. In NRDC v. New York State Department of Environmental Conservation, 668 F. Supp. 848 (S.D. N.Y. 1987), the court ordered New York to adopt an extensive set of rules governing volatile organic compound emissions based on SIP commitments similar to those in New Jersey. The court expressly rejected a request by the state that it be allowed to demonstrate the infeasibility of

compliance, holding that the Act imposed strict liability for compliance with the SIP and that the state's only remedy would be to seek EPA approval of SIP modifications. The very same conclusion was reached by the court in American Lung Association v. Kean, 18 Env'tl. L. Rptr. (Env'tl. L. Inst.) 20317, 20318-19 (D. N.J. 1987).

3. Court ordered compliance schedules: Where the deadlines for implementing SIP commitments have passed, how quickly should states be required to remedy the situation? The courts will generally ask for proposed compliance schedules from the parties and pick the earliest achievable dates. The decisions do offer some guidelines:

- the court order should provide for SIP implementation "as expeditiously as practicable." American Lung Association v. Kean, 18 Env'tl. L. Rptr. at 20317;

- the court order must incorporate final compliance dates. NRDC v. New York State Department of Environmental Conservation, 668 F. Supp. at 855;

- the federal court can order the bypassing of usual state procedures to expedite compliance. Id.;

- inconvenience and expense does not justify a more protracted compliance schedule. Id.;

- the state's duty to comply with the SIP is not contingent on continued violation of the ambient air quality standard. American Lung Association v. Kean, 670 F. Supp. 1285 (D. N.J. 1987).

F. Sanctions.

1. Highway fund cutoff.

In urban nonattainment areas where transportation controls are needed to attain the standard, EPA must initiate a cutoff of federal highway assistance where the Agency "finds" that the state has not submitted an adequate Part D plan "or that reasonable efforts towards submitting such an implementation plan are not being made." §7506(a). EPA takes the position that these requirements must be read conjunctively, and that a fund cutoff is mandated only if the Agency finds both that a state plan is inadequate and that the state is not making reasonable efforts to correct the deficiencies. Because EPA almost never finds a lack of reasonable efforts, the highway fund cutoff has very rarely been imposed.

EPA's reading of the statute was upheld in McCarthy v. Thomas, 17 Env'tl. L. Rptr. at 21214-16. There, EPA had disapproved the Arizona SIP but had not made a finding of lack of reasonable efforts. The court found the statute and legislative history to be ambiguous on whether this would mandate a fund cutoff, and therefore deferred to the Agency interpretation. Language in a Tenth Circuit opinion suggests the opposite result. In upholding an EPA ordered highway fund cutoff in New Mexico, the court expressly noted that the statute was written in the disjunctive, and that "either" a finding of lack of reasonable efforts or a plan disapproval would trigger the sanction. New Mexico Environmental Improvement Division v. Thomas, 789 F.2d 825, 833 (10th Cir.

1986). In a Pennsylvania case, a district judge imposed the highway fund cutoff as a sanction for the state's noncompliance with a consent decree entered into with a citizens group. Delaware Valley Citizens Council v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa. 1982). The court imposed the fund cutoff as a contempt sanction, drawing the idea from §7506(a), but did not hold that a cutoff was mandated by the statute.

2. Construction ban: EPA has long taken the position that the construction ban on new major sources of pollution takes effect automatically whenever EPA disapproves a SIP. Accordingly, citizens groups seeking imposition of the construction ban have generally sought to force EPA disapproval of the SIP. The construction ban must also be imposed where a state is failing to implement its SIP. §7503(1)(B)(4). Clean air advocates in San Francisco are currently seeking imposition of the construction ban on this latter basis. Citizens for a Better Environment v. Deukmejian, supra.

(3.2)